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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/595,049	01/18/2006	David M. Hammerbeck	C1271.70077US00	1834

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EXAMINER	
FUBARA, BLESSING M	
ART UNIT	PAPER NUMBER
1613	
MAIL DATE	DELIVERY MODE
10/12/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	**Application No.** 10/595,049	**Applicant(s)** HAMMERBECK ET AL.	
	Examiner BLESSING M. FUBARA	**Art Unit** 1613	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 21 September 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☐ The period for reply expires _____months from the mailing date of the final rejection.
   b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: *107, 11, 12, 15-21, 35 and 49 (see page 2, para. 4 of Office action of 7/21/10 for clm 49)*.
   Claim(s) withdrawn from consideration: *36,37,41,43 and 45*.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/Blessing M. Fubara/
Primary Examiner, Art Unit 1613

Continuation of 11. does NOT place the application in condition for allowance because: The rejection of claims 1-7, 11, 12, 15-21, 35 and 49 under 35 USC 102(b) over Skwierczynski is not maintained because the compositions for which viscosity is disclosed have viscosities in excess of 100 cps. However, applicant's arguments with respect to Crooks or Miller in view of Skwierczynski are not persuasive in view of the discussions below:

Viscosity is a property of the composition and a composition comprising an immune response modifier, water, hydrophilic enhancing agent and where the hydrophilic viscosity enhancing agent is not covalently bonded to the immune response modifier would also have the same properties and in this case viscosity. Therefore, while the examiner agrees with applicant that Crooks (6,331,539) and Miller (6,083,505) do not say that their compositions are sprayable and have viscosity of less than 100, viscosity and sprayable are characteristic properties of the compositions with sprayable composition also being an intended use of the composition. For example, Miller teaches composition comprising an immune response modifier, water, carriers and polysaccharide (column 3, lines 4-11, col. 8, lines 13, 61-67, claims 1, 7 and 12; col. 9, lines 41, 42) meeting the limitations of the composition of at least claim 1; the composition is contemplated for topical administration nasally and could also be injected (column 9, lines 2, 5) and being injectable indicates a solution or liquid formulation and as such is sprayable.

While Skwierczynski (6,245,776) exemplifies compositions having viscosities higher than 100 cps, Skwierczynski was not relied upon for the viscosity. Rather, Skwierczynski was relied upon for teaching that polysaccharides such as xanthan gum at 0.5% is used with immune modifiers such as the type disclosed by Miller. Xanthan gum and polysaccharides are viscosity enhancing hydrophilic agents of the claims. Therefore, using the polysaccharide/xanthan gum of Skwierczynski (6,245,776) in the compositions of Miller or Crooks would produce a composition that is injectable and capable of being used nasally since xanthan gum polysaccharide has been known in the art to be used in compositions for delivering immune response modifiers.